



**Department of Energy
Acquisition Regulation**

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ACQUISITION LETTER

AUTHORITY

This Acquisition Letter (AL) is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Department of Energy Acquisition Regulation (DEAR) subsection 901.301-70.

CONTENTS

- I. **Purpose.** The purpose of this AL is to provide implementing guidance concerning significant provisions of the Federal Acquisition Streamlining Act of 1994 (FASA), and resulting changes to the Federal Acquisition Regulation (FAR). In addition, Acquisition Letters 94-20, 95-10, 95-11 and 95-13 are hereby cancelled and their content incorporated in the attached "FASA Implementation Handbook".
- II. **Background.** On October 13, 1994, the President signed into law the FASA, Public Law 103-355. FASA provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Interim or final rules have been published implementing the majority of FAR regulations resulting from FASA.
- III. **Guidance.** The attached "FASA Implementation Handbook" contains detailed summaries and implementing guidance on the most significant statutory and regulatory changes impacting the Federal acquisition process resulting from FASA. Specifically, the "FASA Implementation Handbook" is intended to provide Department of Energy (DOE) contracting personnel with a consolidated reference guide containing individual chapters dedicated to new or revised requirements on commercial items acquisitions; multiple award task/delivery order contracts; special contracting methods; small business; allowable costs; protests; disputes and simplified acquisition.

In addition to detailed summaries of the significant regulatory changes implemented as a result of FASA, the "FASA Implementation Handbook" provides specific DOE implementing guidance and requirements, including establishing DOE delegations of authority to implement FAR requirements; model contract provisions and clauses pertaining to multiple award contracts and allowable cost provisions; and other guidance and/or requirements necessary for DOE implementation of FASA requirements.



FASA IMPLEMENTATION HANDBOOK



**U.S. Department of Energy
Office of Procurement and Assistance Management
Office of Policy (HR-51)**

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INTRODUCTION

On October 13, 1994, the President signed into law the Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103-355. FASA provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements.

This "FASA Implementation Handbook" contains detailed summaries and implementing guidance on the most significant statutory and regulatory changes impacting the Federal acquisition process resulting from FASA. Specifically, this Handbook is intended to provide Department of Energy (DOE) contracting personnel with a consolidated reference guide containing individual chapters dedicated to new or revised requirements on such topics as commercial items acquisitions, multiple award task/delivery order contracts, special contracting methods, small business, allowable costs, protests, and simplified acquisition.

In addition to detailed summaries of the significant changes implemented as a result of FASA, this Handbook provides specific DOE implementing guidance and requirements, including the establishment of delegations of authority within DOE necessary to effectively implement FAR requirements; model contract provisions and clauses pertaining to multiple award contracts and allowable cost provisions; and other guidance and/or requirements necessary for DOE implementation of FASA. Guidance or implementing requirements set forth in this Handbook which necessitates formal DOE rulemaking either has or will be issued accordingly.

Most importantly, the "FASA Implementation Handbook" has been developed as a "living document". Accordingly, the Handbook is subject to periodic revision resulting from new or modified statutory and regulatory coverage, or newly identified requirements for specific DOE guidance associated with the effective implementation of FASA.

NOTE: DOE contracting personnel are advised that this Handbook does not restate or address all FAR regulations that implement FASA requirements. Therefore, contracting personnel should refer to appropriate FAR implementing regulations to ensure full compliance with applicable requirements when processing procurement transactions. A listing of all implementing Federal Acquisition Regulations (FAR) is provided as Attachment 1 of this Handbook.

COMMERCIAL ITEMS

I. Background

This chapter provides guidance pertaining to implementation of Title VIII of FASA regarding the acquisition of commercial items and components by the Federal Government as well as its contractors and subcontractors at all levels. Specifically, this chapter provides general information regarding significant revisions to FAR Parts 2, 10, 11 and 12. This chapter consists of guidance regarding the preference for the acquisition of commercial items; conducting market research; commercial services acquisitions; competition advocate responsibilities; and other topics associated with new statutory and regulatory requirements resulting from FASA. Pertinent issues associated with the pricing of commercial items are addressed in Chapter 7 of this Handbook entitled "Truth in Negotiations".

II. Summary of Significant FAR Changes Regarding Commercial Items

A. Part 2

Part 2 has been amended to incorporate the definitions of "commercial item", "component", "commercial component" and "nondevelopmental item" from the FASA, with only minor revisions for clarification. The clause at 52.202-1, Definitions, has been similarly revised to make the definitions available to prime and subcontractors.

B. Part 3

FASA exempts prime and subcontractors providing commercial items from certain certification requirements of the Procurement Integrity Act. Accordingly, FAR 3.104-9, Certification requirements, and the associated solicitation provision at FAR 52.203-8, and clause at FAR 52.203-9, have been amended.

C. Part 10

Part 10 has been completely revised to address requirements for conducting market research. It contains some language taken from previous FAR Part 11. This new Part establishes the requirement for conducting market research as the first step in the acquisition process. Market research is considered an essential element in later phases of the acquisition process (e.g., solicitation) with respect to describing the agency's needs; developing the overall acquisition strategy; and identifying terms and conditions unique to the acquisition.

nongovernmental purposes and that (1) Has been sold, leased, or licensed to the general public; or (2) Has been offered for sale, lease, or license to the general public;

(b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for (1) Modifications of a type customarily available in the commercial marketplace; or (2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements ("**Minor modifications**" means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process). Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;

(e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services (1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and (2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;

(g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

FAR 12.207 also provides that indefinite-delivery contracts (see subpart 16.5) may be used for acquisitions of commercial items where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Based on the above, if an indefinite delivery contract is to be utilized to acquire a commercial service, the unit price for the service being acquired shall be based on the specific task to be performed and not an hourly rate for a particular labor category.

An example of a service that would meet the FAR definition of a "commercial item" would be the acquisition of an off-the-shelf training course for the use of a certain type of commercially available computer software. The course itself would be the "specific task to be performed", and would be priced on a firm-fixed-price basis for the specific task.

Conversely, should the Government require the development of a unique training course for a software package developed for Government use, and where the development of such software is priced using fixed hourly rates for labor, with other direct expenses such as course materials, reproduction, etc. being reimbursed at cost (e.g., a time and materials type contract), this would not constitute a commercial service pursuant to the definition at FAR 2.101 and the limitations at FAR 12.207 as the course is not priced on the basis of the specific task to be performed. Therefore, the procedures at FAR Part 12 should not be used.

IV. Market Research

A. General

FAR Part 10 prescribes policies and procedures for conducting market research to determine the most suitable approach to acquiring, distributing, and supporting supplies and services, regardless of whether they are commercial or non-commercial supplies or services.

The extent of market research to be conducted should be appropriate to the circumstances of the item or service being acquired. Factors such as urgency, estimated dollar value, complexity, and past experience in acquiring the item or service may impact the extent of market research involved.

B. Procedures

Market research is conducted to determine if commercial items or nondevelopmental items (if commercial items are unavailable) are available to meet the Government's needs, or whether such items could be modified to meet the Government's needs.

Market research should be conducted before developing new requirements

(ii) Reviewing the results of recent market research undertaken to meet similar or identical requirements;

(iii) Publishing formal requests for information in appropriate technical or scientific journals or business publications;

(iv) Querying Government data bases that provide information relevant to agency acquisitions;

(v) Participating in interactive, on-line communication among industry, acquisition personnel, and customers;

(vi) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources;

(vii) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line; or

(viii) Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

DOE Guidance: The responsibility for conducting market research is shared between the program official(s) within the requiring organization and the Contracting Officer. In addition, other experts or individuals may be required to assist with specific aspects of market research depending on the item or service being acquired, including finance, property, logistics, legal and other personnel. These individuals may provide valuable assistance in areas being researched such as specific financing arrangements; warranties; packaging, handling and delivery; and a number of other issues for which neither the Contracting Officer or program official may be technically qualified to evaluate.

Techniques for conducting market research may also include use of bidders' lists for previous acquisitions for the same or similar supplies/services to identify sources of information; contacting state or local Governments to determine if similar items/services have been acquired and from what source(s); use of commercial publications such as Consumer Reports; and use of the Commerce Business Daily, the Internet or electronic bulletin board systems to solicit information/comments pertaining to Government requirements.

For assistance in using the Internet or electronic bulletin boards to solicit industry comments or information, contact the DOE Business Communications Center on (202) 634-4533, or via E-mail at bcc@hq.doe.gov.

The Federal Acquisition Institute is in the process of developing a formal training

functions to be performed, performance required, or essential physical characteristics of the required item(s). Requirements shall be stated in terms that enable and encourage offerors to supply commercial items, or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items.

The Government's requirement description should contain sufficient detail for potential offerors of commercial items to know which, if any, commercial products or services may fulfill the Government's stated requirements. Generally, for acquisitions in excess of the simplified acquisition threshold, an agency's statement of need for a commercial item should describe the product or service to be acquired, and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics.

To the maximum extent practicable, potential offerors should be given an opportunity to comment on agency requirements, or to recommend application and tailoring of requirements documents and alternative approaches.

Additionally, agencies should prepare product descriptions to achieve maximum practicable use of recovered material and other materials that are environmentally preferable, and energy efficient products and services (see subparts 23.4 and 23.7).

B. Order of Precedence

Agencies may select from existing requirements documents (item specifications/work statements), modify or combine existing requirements documents, or create new requirements documents to meet its needs, consistent with the following order of precedence (see FAR 11.101):

- (1) Documents mandated for use by law.
- (2) Performance-oriented documents.
- (3) Detailed design-oriented documents.
- (4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive acquisition of items.

C. Market Acceptance

The head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered:

- (i) have achieved commercial market acceptance, or been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and

B. When a written solicitation will be issued for the acquisition of commercial items, the Contracting Officer may use the streamlined procedure set forth at FAR 12.603 to reduce the time required to solicit and award contracts for commercial items. This streamlined procedure combines the Commerce Business Daily (CBD) synopsis required by FAR 5.203 and the issuance of the solicitation into a single document. FAR 12.602 describes streamlined procedures for the evaluation of offers.

C. Contracting officers should, if appropriate, request existing product literature from offerors of commercial items in lieu of unique technical proposals. When technical information is necessary for the evaluation of offers for a particular acquisition, the Contracting Officer should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation during the conduct of market research.

D. Offerors should be permitted to offer more than one product that will satisfy the Government's requirements in responding to a single solicitation for a commercial item(s), with each product being considered a separate offer for the purposes of evaluation.

E. Past performance should be utilized as an important element in the evaluation of commercial items. Past performance data from both inside and outside the Government should be considered in evaluating a particular commercial item or service.

DOE Guidance: DOE contracting personnel are referred to Acquisition Letter 95-8 for guidance pertaining to the use of past performance in the evaluation of offers.

VIII. Quality Assurance

The Contracting Officer shall rely on the contractors' existing quality assurance systems for the acceptance of commercial items in lieu of Government specified inspection and testing procedures. However, in-process inspection of commercial items is permitted if such inspection is consistent with customary market practices for the item being acquired .

IX. Financing Arrangements for Commercial Acquisitions

In general, it is the responsibility of the contractor to provide all required resources for performance of a Government contract, including contracts for the acquisition of commercial items. However, in some commercial markets, buyer financing is a customary practice. Therefore, new FAR subpart 32.2, Commercial Item Purchase Financing, sets forth policies and guidance pertaining to Government financing of commercial purchases. In addition, new FAR subpart 32.2 provides several, alternative procedures for establishing contract financing terms for

pursuant to the procedures at FAR 12.403, the Government may terminate a contract for convenience or for cause, when such a termination would be in the best interests of the Government and following consultation with legal counsel.

B. Termination for Cause

With regard to the Government's rights to terminate a contract for commercial items for "cause", the contractor is required to notify the Contracting Officer, as soon as possible after commencement of any excusable delay. This requirement should eliminate the need for the Government to issue a "show cause notice" prior to terminating a contract. However, the Contracting Officer is required to issue a "cure notice" prior to terminating a contract for a reason other than late delivery.

If a termination for cause is determined appropriate, such termination shall be issued by the Contracting Officer, in writing, and specify the reasons for the termination, the remedies the Government intends to seek as a result of the termination, and state that the notice of termination for cause constitutes a final decision of the Contracting Officer, citing the contractor's right to appeal under the Disputes clause of the contract (see FAR 33.211).

Pursuant to paragraph (m) of the clause at 52.212-4, the Government's rights after a termination for cause shall include all the remedies provided by law. The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess procurement costs together with any incidental or consequential damages incurred because of the termination for cause.

C. Termination for Convenience

When a contract for commercial items is terminated for the convenience of the Government, the Government is required to pay the contractor the percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination for convenience, and any charges that the contractor can demonstrate directly resulted from the termination. The contractor is not required to comply with the cost accounting standards or the contract cost principles in FAR Part 31 in demonstrating such charges and may use its standard record keeping system. Moreover, the Government does not have the right to audit the contractor's records solely because of the termination for convenience.

XIII. Solicitation Provisions and Contract Clauses

A. General

FAR 12.302 prescribes several solicitation provisions and contract clauses that are

inconsistent with the needs of the Government.

DOE Guidance: Authority to approve the waiver described above is delegated to the Contracting Officer. When acquiring commercial items, customary commercial practices and associated terms and conditions will normally fulfill the Contracting Officer's objectives and responsibilities for obtaining the best practicable deal for the Government. However, contracting personnel are encouraged and empowered to identify circumstances that warrant the tailoring of customary commercial terms and conditions to ensure that the best interests of the Government are served for each individual acquisition.

For example, customary commercial practice for a specific item may be that the buyer finances a certain percentage of the total acquisition cost of the item. Although the Contracting Officer is authorized to provide for interim or advance payments under certain conditions when acquiring commercial items (see paragraph IX. above and FAR 32.2), the Contracting Officer may consider that withholding payment, in whole or in part, until the Government takes delivery of the item is in the best interest of the Government for the particular acquisition; e.g., the Government's financial obligation and risk is minimized in the event of manufacturing or delivery problems that are the fault of the contractor. Accordingly, the Contracting Officer may require that the contractor use its own resources to manufacture the item being acquired, or elect to provide less Government financing of the item than is normally provided for in the commercial marketplace.

Waiver requests described above, and at FAR 12.302, shall be sufficiently documented depending upon the circumstances of the particular acquisition, and incorporated into the contract file.

XIV. Prime Contractor Flowdown Requirements

A. Prime Contracts For Commercial Items

FASA and FAR implementing regulations limit the applicability of certain laws to Government prime contracts and subcontracts for commercial items. The clause at FAR 52.212-5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items", shall be used for the award of Government prime contracts for commercial items. This clause incorporates, by reference, only those clauses that are prescribed to implement provisions of law or executive order that are applicable to the acquisition of commercial items. Subcontract flowdown requirements for prime contractors providing commercial items to the Government are specified in clause 52.212-5(e).

Although paragraph (e) of the clause at 52.212-5 specifically limits the prime

Similar to FAR clause 52.212-5 (see subparagraph A. above), FAR clause 52.244-6 also limits the prime contractor's obligation to incorporate certain clauses into subcontracts for commercial items or components. Specifically, the clause at 52.244-6 stipulates that, notwithstanding any other clause of the prime contract, the Contractor is not required to include any FAR provision or clause, other than those listed within clause 52.244-6 in a subcontract for commercial items. As discussed in the preceding subparagraph A., additional statutory flowdown provisions may be applicable depending upon the nature and type of commercial item(s) being acquired by the prime contractor (e.g., requirement for the use of clause 52.219-8, "Utilization of Small, Small Disadvantaged and Woman-Owned Small Business Concerns"). Contractors may also include appropriate FAR provisions and clauses as may be required to establish the reasonableness of prices under FAR Part 15, in a subcontract at any tier for commercial items or commercial components.

FAR 44.402(c) authorizes agencies to supplement clause 52.244-6 as necessary to reflect agency unique statutes.

DOE Guidance: The FAR final rule implementing FASA provisions pertaining to commercial items acquisitions by Federal agencies, as well as contractors and subcontractors at all levels (60 FR 48231, September 18, 1995) requires that the new policies, provisions and clauses set forth therein were effective on October 1, 1995. However, use of the new policies provisions and clauses for acquiring commercial items was optional prior to December 1, 1995, and mandatory thereafter.

DOE Contracting Officers shall incorporate FAR clause 52.244-6 into all DOE M&O prime contracts as soon as practicable, but by not later than the next fee negotiation for the contract, so that the DOE and its M&O contractor's can take advantage of the streamlining benefits of the new subcontracting policies and procedures for acquiring commercial items.

With regard to DOE non-M&O prime contracts for other than commercial items, DOE Contracting Officers are not required to amend solicitations issued prior to December 1, 1995, or to modify existing DOE contracts for other than commercial items to incorporate the clause at FAR 52.244-6. However, Contracting Officers are not precluded from doing so if it is determined to be in the best interest of the Government.

In light of the flowdown requirements and limitations contained in FAR clause 52.244-6, and the restrictions for agency supplementation of this clause (see FAR 44.402(c)), an analysis of each of the clauses set forth in paragraph (b) of DEAR 970.5204-44, "Flowdown of Contract Requirements to Subcontracts (Oct 1995)" has been conducted by the Office of Policy (HR-51). This analysis was conducted to determine the applicability and/or inapplicability of each of the clauses set forth at DEAR 970.5204-44(b) for M&O subcontracts for commercial items. Accordingly,

MULTIPLE AWARD TASK ORDER/DELIVERY ORDER CONTRACTS

I. Background

This chapter provides guidance pertaining to Section 1054 of FASA, and implementing regulations at Part 16 of the Federal Acquisition Regulation. Specifically, this chapter provides general information regarding the preference and mandatory requirements for the use of multiple awards for task order and delivery order contracts, and exceptions thereto; contract administration responsibilities; contracting methods not subject to the preference for multiple awards; Task and Delivery Order Ombudsman responsibilities and model clauses and solicitation provisions.

II. Definitions (see FAR 16.501-1)

Advisory and Assistance Services include services performed under contract by nongovernmental sources to provide:

(a) Management and professional support services. Assistance, advice or training for the efficient and effective management and operation of organizations, activities or systems. Such services are normally related to the basic mission of the agency.

(b) Studies, analyses, and evaluations. Organized, analytical assessments/evaluations supporting policy development, decision-making, management or administration. Included are studies supporting R&D, acquisitions of models, methodologies and related software supporting studies, analyses or evaluations.

(c) Engineering and technical services. Support to program during the acquisition cycle (e.g., systems engineering/technical direction) to ensure the effective operation/maintenance of a weapon system or major system (OMB Circular A-109). Direct support of a weapon system that is essential to R&D, production, operation or maintenance of the system.

The term does not include the following services:

(a) Routine automated data processing and telecommunications services unless such services are an integral part of a contract for the procurement of advisory and assistance services.

(b) Architectural and engineering services, defined in section 901 of the Brooks Architect-Engineers (A&E) Act (40 U.S.C. 541).

(c) Research on theoretical mathematics, and basic research on medical,

5.202(a)(6) and 5.301(b)(4)).

B. Multiple Awards - Other than Advisory and Assistance Services

The Contracting Officer is given broad discretion to use sound business judgement in acquisition planning to determine whether multiple awards are appropriate for acquisitions of other than advisory and assistance services exceeding \$10,000,000 and 3 years, including options.

Multiple awards should not be made under the following circumstances:

- (i) When only one contractor can provide the level of performance and quality required because the services are unique/highly specialized;
- (ii) When more favorable terms and conditions can be obtained via a single award based on the Contracting Officer's knowledge of the market;
- (iii) When the administrative cost of multiple contracts would outweigh the potential benefits of awarding multiple contracts; ✓
- (iv) When tasks to be ordered for the requirement are so integrally related that only one contractor should perform the work;
- (v) When the total estimated value of the contract is less than the simplified acquisition threshold (\$100,000); or
- (vi) When the Contracting Officer determines that multiple awards would not be in the best interest of the Government.

DOE Guidance: The Contracting Officer's determination regarding whether a single award or multiple awards are appropriate for a specific requirement should be made at the earliest practicable stage of the advance planning process. If a single award of an indefinite quantity contract for other than advisory and assistance services is determined appropriate, no separate written determination to make a single award is necessary when the determination is contained in a written acquisition plan. If the determination is not contained in a written acquisition plan, a separate written determination supported by one of the exceptions cited above shall be executed and placed in the pre-award contract file.

C. Multiple Awards - Advisory and Assistance Services

Multiple awards shall be made for indefinite-quantity contracts for advisory and assistance services exceeding \$10,000,000 and 3 years, including all options, except:

issuance of formal Task Orders or Task Assignments to assign discrete work requirements and to initiate contractor performance under the contract, the preference and mandatory requirements for making multiple awards would not be applicable as this type of contract is not a Task Order Contract as defined by FASA and the FAR (see paragraph II.C. above).

It is pertinent to note that there have been DOE services contracts which have used Task Assignments as a vehicle to assign work and initiate performance under contracts in which the contract work requirements are repetitive in nature throughout the term of the contract and that can otherwise be identified adequately in advance of solicitation and contract award; e.g., the operation of a computer center, mailroom, supply room, etc. As stated in the preceding paragraph, the issuance of Task Assignments under such contracts may be unnecessary and inappropriate. Accordingly, Contracting Officer's should closely evaluate each contract statement of work to determine if the issuance of Task Orders or Task Assignments are necessary for contractor performance, or whether other, somewhat less formalized methods of managing the contract work requirements may be employed by the Government. Other methods to manage contract work requirements that are repetitive, completion-type contracts may include Contracting Officer Representative issuance of written technical direction, or the issuance of periodic mission plans, as required.

C. The extension of contracts for advisory and assistance services referenced above is a one-time extension for a maximum of 6 months. Accordingly, Contracting Officers should note that this extension differs from that provided for by the existing clause at FAR 52.237-3 "Continuity of Services" in that the maximum 6 month period cannot be broken into separate option periods totalling 6 months; e.g., 3 two-month options. For clarification purposes, should the Contracting Officer anticipate a need for a 4 month extension, and utilizes the authority provided for at FAR 16.505(c) to extend the contract for one 4-month period, no additional extension to the contract is permitted.

IV. Ordering Procedures

A. General

The Contracting Officer is given broad discretion in determining the procedures and selection criteria for providing awardees a fair opportunity to be considered for each Order. The discretion provided for determining the procedures for issuing task orders is intended to promote the most effective and efficient use of multiple award contracts. The Contracting Officer may consider each awardee's past performance under the immediate contract or under prior contracts for the same or similar supplies or services; the quality of deliverables; the contractor's cost control; the

The third alternative is any other criterion that may be specified by the Contracting Officer.

The solicitation provision, "Task Orders Under Multiple Awards", may be used in conjunction with the appropriate FAR solicitation provision, either FAR 52.216-27 or FAR 52.216-28 pertaining to the award of multiple task order contracts. All applicable standard clause sets have been modified to incorporate the aforementioned new FAR clauses. If modifications are made to these clauses or provisions or if other clauses or provisions are used, a copy of each should be provided to the Office of Policy (HR-51) so that we may improve or expand on the models available.

The Contracting Officer shall document the basis for each selection in the issuance of each Task Order pursuant to the procedures stated in the contract, whether or not formal Task Order proposals are requested.

B. Fair Opportunity for Consideration

For Orders issued under multiple award contracts, each awardee shall be provided "a fair opportunity to be considered" for each Order valued in excess of \$2,500, unless a determination is made by the Contracting Officer citing one of the following exceptions:

- (i) the Department's urgent need precludes providing such opportunity if it would result in unacceptable delays;
- (ii) there is only one contractor capable of providing the supplies or services to be ordered at the level of quality required due to the unique or highly specialized nature of the supplies or services;
- (iii) in the interest of economy and efficiency, the Order should be issued on a sole-source basis as a logical follow-on to an Order already issued; provided that all awardees were provided a fair opportunity for consideration of the original Order issued; or
- (iv) it is necessary to place a sole-source Order to satisfy a minimum contractual guarantee with an awardee.

DOE Guidance: DOE Contracting Officers shall establish minimum ordering guarantees with each awardee for all indefinite-quantity, multiple award contracts. Minimum ordering guarantees are necessary so that adequate consideration exists to contractually bind each awardee to participate in the Ordering process throughout the duration of the multiple award contract. Minimum guarantees should be equal

Ombudsman shall review concerns and disagreements expressed by a contractor or contractors awarded a contract under which the task subject to the complaint was issued.

D. The Contracting Activity Ombudsman shall collect all facts from the cognizant organization/individuals that are relevant to the complaint submitted to ensure that all contractors were afforded a fair opportunity to be considered for the Order issued in accordance with the procedures set forth in each awardees' contract. Where, upon review of all relevant information, the Contracting Activity Ombudsman determines that corrective action should be taken, he or she shall report the determination to the cognizant Contracting Officer.

E. The Contracting Activity Ombudsman shall maintain a written log to track each complaint submitted from receipt through disposition. If anonymity is requested by the awardee filing the complaint, the Contracting Activity Ombudsman shall not disclose the identity of the complainant, and the name of the contractor shall not be recorded in the log.

F. The Contracting Activity Ombudsman shall attempt to resolve complaints at the local level. Issues which cannot be so resolved should be forwarded to the DOE Task and Delivery Order Ombudsman.

G. Each Contracting Activity and the DOE Ombudsman shall ensure that no information is released which is determined to be proprietary or is designated as source selection information.

Questions pertaining to multiple awards may be directed to Robert Webb, HR-51, at (202) 586-8264. Questions pertaining to Ombudsman procedures may be directed to Robert Barnes, HR-52 at (202) 586-9065.

SPECIAL CONTRACTING METHODS

I. Background

This chapter provides guidance pertaining to implementation of FASA, Section 1074 on the Economy Act; Sections 1503, 1504, 1552, and 1553 on the delegation of procurement functions and determinations; Section 2454 on advisory and assistance services; and Section 6002 on contracting functions performed by Federal personnel.

II. Definitions

Advisory and Assistance Services - see FAR 37.201 (definition) and 37.202 (exclusions); also see Chapter 2 of this Handbook, entitled "Multiple Award Task and Delivery Order Contracts", paragraph II.

Covered Personnel (e.g., Federal employee) means an officer or an individual who is appointed in the civil service by one of the following acting in an official capacity: (1) the President; (2) a member of Congress; (3) a member of the uniformed services; (4) an individual who is an employee under 5 U.S.C. 2105; (5) the head of a Government-controlled corporation; or (6) an adjutant general appointed by the Secretary concerned under 32 U.S.C. 709(c). The term also means a member of the United States armed services, and a person assigned to a Federal agency who has been transferred to another position in the competitive service to another agency.

III. Determinations, Authorities and Responsibilities

A. Assignment of Contracting Functions Among Agencies

FAR 1.601 provides that agency heads may mutually agree to assign contracting functions and acquisition responsibilities from one agency to another; and to create joint or combined offices to exercise acquisition functions and responsibilities.

DOE Guidance: The Procurement Executive will perform this function under the contracting authority delegated by the Secretary of Energy. This authority will not be redelegated.

B. Interagency Acquisitions Under the Economy Act

FAR 17.503 sets forth the requirement that each interagency acquisition under the Economy Act be supported by a determination and findings that states (i) that use of the interagency acquisition is in the government's best interest; and (ii) that the supplies/services cannot be obtained as conveniently or cheaply by contracting directly with a private source.

required.

FAR 37.204(b) states that if, for a specific evaluation or analysis of proposals, such personnel are not available from within the agency, the agency head shall (1) determine which Federal agencies may have such qualified personnel; and (2) consider the administrative cost and time associated with conducting the search, the dollar value of the acquisition, and other costs (e.g., travel costs) that would be involved in the use of such personnel, and the needs of the Federal agencies to make management decisions regarding the best use of available personnel in performing the agency's mission.

DOE Guidance: The Source Selection Official, with the concurrence of the Head of the Contracting Activity for the procurement is delegated authority to approve the determination cited above for source evaluation board acquisitions. For other acquisitions, this authority is delegated to the Senior Program Official or designee, with the concurrence of the Head of the Contracting Activity or designee.

FAR 37.204(d) states that the requesting agency, after reasonable attempts to obtain personnel with the required training and capabilities, is unable to identify such personnel, the head of the agency may make the determination required by FAR 37.203. Accordingly, FAR 37.203(d) limits payments to contractors for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award, unless:

(i) neither covered personnel (see above) from the requesting agency, nor from any other agency, with adequate training and capabilities to perform the required proposal evaluation are readily available and a written determination is made in accordance with FAR 37.204; or

(ii) the contractor is a Federally Funded Research and Development Center (FFRDC) and the work placed under the FFRDC meets the criteria at FAR 35.017-3 (e.g., within the purpose, mission, general scope of effort, or specific competency of the FFRDC, etc.).

DOE Guidance: Authority to approve the determination required by 37.203(d) when it is determined that qualified covered personnel are not available within DOE or from another agency, and that contractors will conduct evaluations or analyses of any aspect of a proposal for an initial contract award is delegated to the Source Selection Official, with the concurrence of the Head of the Contracting Activity for the procurement is delegated authority to approve the determination cited above for source evaluation board acquisitions. For other acquisitions, this authority is delegated to the Senior Program Official or designee, with the concurrence of the Head of the Contracting Activity or designee.

CONTRACT AWARD IMPLEMENTATION

I. Background

This chapter provides a summary of significant changes resulting from the implementation of FASA. Specifically, this chapter of the Handbook addresses changes pertaining to the acquisition of expert services; requirements for incorporation of evaluation factors and subfactors in solicitations; authority to award without discussions; prompt notice of unsuccessful offerors; and debriefings.

II. Summary of Significant Changes

A. Acquisition of Expert Services

Section 1055 of FASA provides for the acquisition of expert services for use in any litigation or dispute involving the Federal Government as an exception to the use of full and open competition. Accordingly, this exception is added at FAR 6.302-3, Industrial mobilization; engineering, developmental, or research capability; or expert services. This exception also applies to the acquisition of experts or neutrals for the purposes of alternative dispute resolution procedures. Such acquisitions are also excepted from requirements for publication of a notice in the Commerce Business Daily (see FAR 5.202(a)(15)).

B. Evaluation Factors and Subfactors

Section 1061 of FASA requires that solicitations for competitive proposals shall be tailored to each acquisition and shall include only those factors and subfactors that will have an impact on the source selection decision (see FAR 15.605).

Agencies shall address "Quality" in every source selection through the inclusion of one or more non-cost evaluation factors or subfactors, including, past performance, technical excellence, management capability, personnel qualifications, prior experience and schedule compliance.

At a minimum, the solicitation shall:

- (i) state the significant evaluation factors, including cost/price and related factors; past performance; and other non-cost/price related factors; and
- (ii) state any significant subfactors that will be considered in making the source selection and their relative importance;
- (iii) state whether all evaluation factors other than cost or price, when combined,

- (ii) the overall evaluated cost/price and technical rating of the **successful offeror** and the **debriefed offeror**;
- (iii) the overall ranking (e.g., first, second, third) of all offerors when any ranking was developed by the agency;
- (iv) a summary rationale for award;
- (v) the make and model of the item to be provided by the successful offeror (for commercial end item acquisitions); and
- (vi) reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

Debriefings shall not:

- (i) include a point-by-point comparison of the debriefed offeror's proposal with those of the other offerors; or
- (ii) reveal any information exempt from release under the Freedom of Information Act (e.g., trade secrets, privileged information, etc.)

Implementing regulations at FAR 15.1004(g) also provide that if within one year of contract award a protest causes the agency to issue either a new solicitation or a new request for best and final offers on the protested award, the agency shall make available to all prospective offerors the following:

- (i) information provided in any debriefings conducted on the original award about the successful offeror's proposal; and
- (ii) other nonproprietary information that would have been provided to the original offerors.

F. Other Notable Changes

The following three new criteria for excluding a particular source from a contract action in order to establish or maintain alternative source(s) for supplies/services being acquired have been added to FAR 6.202:

- (i) to ensure the continuous availability of a reliable source of supplies or services;

REPEAL OF MISCELLANEOUS CONTRACT AWARD REQUIREMENTS

Background

FAR Case 94-700, Repeal of Miscellaneous Contract Award Requirements repealed the statutory requirement for a determination and finding regarding use of a cost-type contract or incentive contract.

DOE Guidance: DOE published a Final Rule (60 FR 52632) on October 10, 1995 which amends the DEAR to delete subsection 916.301-3, Limitations, in its entirety.

Questions pertaining to the above guidance may be directed to Terrence Sheppard, HR-51, at (202) 586-8174.

SMALL BUSINESS

I. Background

This chapter provides guidance pertaining to implementation of FASA, Section 4004, Reservation; Section 7101(a), Repeal of Certain Requirements; Section 7102 Contracting Program for Certain Concerns; Section 7106, Procurement Goals for Concerns Owned by Woman; and Section 10004, Data Collected through the Federal Procurement Data System.

II. Summary of Significant Changes

A. Reservation

Section 15(j) of the Small Business Act has been amended to establish a reservation for each transaction valued between \$2,500 and \$100,000 (Simplified Acquisition Threshold) exclusively for small business participation, unless the Contracting Officer is unable to obtain offers from 2 or more small businesses that are competitive with regard to market price, quality and delivery. This change revises the previous reservation requirement which was tied to the procedures to be utilized (small purchase procedures), and now ties the reservation requirement to a specific dollar range for transactions regardless of the procedures to be utilized. All applicable FAR regulations and clauses have been modified to reflect the new small business reservation threshold.

DOE Guidance: A technical amendment is in process to revise appropriate DEAR regulations and clauses to reflect the new small business reservation threshold.

In addition, all clause sets and lists have been revised through FAC 90-33 and are now available on the DOE Procurement and Assistance Management Home Page on the Internet at <http://www.doe.gov/html/procurement>. Representation and certification packages have been revised and are also available electronically on the DOE Procurement and Assistance Management Home Page (see "Procurement Information"); and on the DOE Business Communications Center Subsystem on the FedWorld Bulletin Board System, which is accessible via modem at (703) 321-3339 (Modem Settings: Parity = NONE, Data Bits = 8, Stop Bits = 1, Duplex = FULL, Terminal = ANSI). Hard-copies were distributed to all DOE Procurement Directors by memorandum dated October 17, 1995.

B. Repeal of Certain Requirements

FASA repealed Sections 15(e) and (f) of the Small Business Act, which established the priority for award of contracts and subcontracts in carrying out set-

business prime and subcontracts.

DOE Guidance: To ensure that the Department will fulfill its Fiscal Year 1996 small, small disadvantaged and woman-owned small business goals, Contracting Officers shall, to the maximum extent practicable, renegotiate the goals set forth in existing subcontracting plans to include requirements to establish goals for woman-owned small business concerns.

III. Solicitation Provisions and Contract Clauses

A. New FAR section 4.603 "Solicitation provision" is added to prescribe the incorporation of a new provision at FAR 52.204-5 "Woman-Owned Business" in all solicitations exceeding the Simplified Acquisition Threshold of \$100,000, when the contract is to be performed within the U.S., its territories or possessions, Puerto Rico, and the Trust Territories of the Pacific Island, or Washington, D.C.

B. FAR Section 19.304, "Solicitation provision and contract clause" has been amended to consolidate and eliminate the previous three representations for , Small Disadvantaged Business and Woman-Owned into one representation provision entitled, "Program Representations" (FAR 52.219-1).

DOE Guidance: All clause sets and lists have been revised. Representation and certification packages have also been revised and are available electronically on the Internet and on the DOE usiness Communications Center Subsystem on the FedWorld Bulletin Board System (see page 6-1).

Modifications of the Federal Procurement Data System (FPDS), Procurement and Assistance Data Systems (PADS) and the Individual Procurement Action Report (IPAR) to accommodate new data collection and reporting requirements are underway and will be completed by not later than October 1, 1996.

NOTE: The solicitation provision at FAR 52.204-5 "Woman-Owned Business" is a provision to collect information on woman-owned businesses only (both large and small), and is separate from the consolidated representation at FAR 52.219-1, which includes a representation section for woman-owned small businesses.

IV. FORMS

Standard Form 294, "Subcontracting Report for Individual Contracts", and Standard Form 295, "Summary Subcontract Report" have been appropriately modified to simplify and streamline the forms and to provide for the reporting of subcontract data for woman-owned small business concerns.

TRUTH IN NEGOTIATIONS

I. Background

This chapter provides guidance pertaining to Sections 1251 and 1252 of FASA, and implementation in the FAR. These Sections make Truth in Negotiations Act (TINA) requirements for civilian agencies substantially the same as those for the Department of Defense primarily by adding penalties for defective pricing. Specifically, this chapter provides general information on the changes effected by the above statutory provisions, including changes to the threshold for the submission of cost or pricing data, and exceptions thereto; clarification of the definition of cost or pricing data; and changes associated with determining price reasonableness.

II. Definitions (see FAR 15.801)

The definition of Cost or Pricing Data has been modified to clarify that the term cost or pricing data means data requiring certification in accordance with FAR 15.804-4, Certificate of Current Cost or Pricing Data. The term "cost or pricing data" means "*certified cost or pricing data*".

A new definition for Cost Realism is added and is defined as the costs in an offeror's proposal are (i) realistic for the work to be performed; (ii) reflect a clear understanding of the requirements; and (iii) are consistent with the various elements of the offeror's technical proposal.

A new definition for Information other than cost or pricing data is added and is defined as any type of information that is not required to be certified, in accordance with FAR 15.804-4, that is necessary to determine price reasonableness or cost realism; including pricing, sales, or cost information and cost or pricing data for which certification is determined to be inapplicable after submission.

A definition for Subcontract applicable to FAR Subpart 15.8 is added and is defined to include a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

III. Order of Preference for Information to Determine Reasonableness of Price

One of the most significant changes resulting from the implementation of FASA Sections 1251 and 1252 is the establishment of a hierarchical policy preference for the types of information to be used in determining the reasonableness of price. To the extent permitted by TINA (see FAR 15.804-2 and 15.804-5(b)), the order of preference for determining the type of information required is as follows:

can be obtained from the offeror or from another source that is adequate for evaluating, through price analysis, the reasonableness of the price of the action. Cost or pricing data may be obtained for a commercial item acquisition only after the Contracting Officer makes a written determination that the pricing information obtained is inadequate for performing a price analysis and determining price reasonableness.

In addition, the FASA implementing regulations set forth detailed standards to be applied when deciding whether or not an exception to TINA requirements is applicable (see FAR 15.804-1(b)). These standards are intended to assist contracting personnel in determining the applicability of appropriate exceptions. Regulatory standards are provided for the three established exceptions mentioned above and for the new exception for commercial items acquisitions and modifications to contracts that were originally exempted. Contracting Officers should consult these standards when determining whether or not to grant an exception in a particular case.

If the Contracting Officer has sufficient information available to determine that an offeror's proposed price is fair and reasonable without requiring the submission of cost or pricing data, and an exception does not apply, under the new regulations the Head of the Contracting Activity may waive the requirement for the submission of cost or pricing data. This authority is non-delegable (see FAR 15.804-1(b)(5)).

In addition, cost or pricing data shall not be required for modifications to contracts or subcontracts for commercial items if the basic contract or subcontract was awarded without the submission of cost or pricing data because the original contract or subcontract was granted an applicable exception from cost or pricing data requirements, and the modification does not change the contract or subcontract to an acquisition for other than a commercial item.

C. Adequate Price Competition

FAR 15.804-1 significantly expands upon the exception to requiring cost and pricing data based on adequate price competition. Under the new standards set forth at FAR 15.804-1(b), a proposed price is deemed to be based on adequate price competition in the following three instances:

- (i) Where two or more responsible offerors, competing independently, submit priced offers responsive to the Government's expressed requirement and award is made to an offeror whose proposal offers either: (a) the greatest value to the Government and price is a substantial factor in source selection; or (b) the lowest evaluated price. In this instance, there must be no finding that the price of the otherwise successful offeror is unreasonable;

DOE Guidance: The final rule implementing the \$500,000 threshold cited above for requiring cost or pricing data was published on September 18, 1995. Notwithstanding that the regulations provide that this threshold is subject to adjustment effective beginning October 1, 1995 and every 5 years thereafter, no adjustment to the threshold was made. Accordingly, the threshold remains \$500,000.

V. Information Other Than Cost or Pricing Data

A. General

The FASA implementing regulations create a new category of data defined as "information other than cost or pricing data". This type of data is essentially the same as cost or pricing data except that it does not have to be certified under 15.804-4. When cost or pricing data is not required because an exception applies or because the value of the acquisition is under the threshold, the Contracting Officer may require the submission of information other than cost or pricing data, but only to the extent necessary to determine price reasonableness or cost realism. The contractor's format for submitting such information shall be used unless the Contracting Officer determines that use of a specific format is essential.

If it is determined that additional information is necessary to determine price reasonableness for acquisitions determined to be based on adequate price competition, the Contracting Officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror. Contracting Officers may also request information other than cost or pricing data to determine the cost realism of competing offers or to evaluate competing approaches.

When cost or pricing data are not required because the acquisition is below the threshold, information requested shall include, as a minimum, appropriate information on prices and quantities at which the same or similar items have previously been sold, that is adequate for evaluating the reasonableness of the proposed price.

B. Acquisition of Commercial Items

When acquiring commercial items for which an exception may apply, Contracting Officers shall seek to obtain information on prices at which the same or similar items have been sold in the commercial marketplace that is adequate for evaluating, through price analysis, the reasonableness of price.

If required information is not available from the offeror, the information shall be sought from another source or sources (e.g., other Government agencies; trade journals).

The SF 1448 shall be used by offerors for the submission of information other than cost or pricing data (see FAR 15.804-6(b)(2)).

VII. Defective Cost or Pricing Data

New regulatory coverage at FAR 15.804-7(b)(7)(i) entitles all Government agencies to penalty amounts on certain overpayments resulting from defective cost or pricing data. This coverage was previously only applicable to Department of Defense contracts.

VIII. Proposal/Pricing Analysis

FAR 15.805-1 is amended to add a paragraph (d) to provide a reference to the Armed Services Pricing Manual as a tool for instruction and professional guidance to pricing and negotiating personnel.

FAR 15.805-2 is amended to add a paragraph (f) to incorporate the comparisons of proposed prices with those for the same or similar items obtained through market research as another price analysis technique.

Questions pertaining to the above guidance may be directed to Terrence Sheppard, HR-51, at (202) 586-8174.

SIMPLIFIED ACQUISITION

I. Background

This chapter provides guidance pertaining to the new simplified acquisition and Federal Acquisition Computer Network (FACNET) requirements of FASA, and implementing regulations of the FAR. An interim rule was published in the Federal Register on July 3, 1995 (60 FR 34741) implementing these requirements.

II. Definitions

Simplified Acquisition Threshold is \$100,000.

Simplified acquisition procedures means the methods prescribed in FAR Part 13 for making purchases of supplies or services using imprest funds, purchase orders, blanket purchase agreements, Governmentwide commercial purchase cards, or any other appropriate authorized method.

Federal Acquisition Computer Network (FACNET) means the Governmentwide Electronic Commerce/Electronic Data Interchange (EC/EDI) systems architecture for the acquisition of supplies and services that provides for electronic data interchange of acquisition information between the Government and the private sector, employs nationally and internationally recognized data formats, and provides universal user access.

Interim FACNET means a contracting office has been certified as having implemented a capability to provide widespread public notice of, issue solicitations and receive responses to solicitations and associated requests for information through FACNET. Such capability must allow the private sector to access notices of solicitations, access and review solicitations, and respond to solicitations.

Full FACNET means an agency has certified that it has implemented all of the FACNET functions outlined in FAR section 4.504, and more than 75 percent of eligible contracts (not otherwise exempted from FACNET) in amounts exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold (see Part 13), were entered into by the agency during the preceding fiscal year using FACNET.

Governmentwide FACNET means that the Federal Government has certified its FACNET capability, and more than 75 percent of eligible contracts (not otherwise exempted from FACNET) in amounts exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold (see FAR Part 13), entered into by the executive agencies during the preceding fiscal year were made through full

completion by the third quarter of Fiscal Year 1996.

Deployment of the selected system will be made by July 1996, well before the President's mandate for implementation of January, 1997. This will result in a electronic small purchasing system throughout the Department, eliminating over 30,000 paper small purchase transactions per year.

Questions pertaining to the above guidance may be directed to Steve Mournighan, HR-53, on (202) 586-1148.

PROTESTS

I. Background

This chapter provides guidance regarding the implementation of the sections of the FASA pertaining to protests. Primary changes to the protest process resulting from FASA are: (a) the time within which a protest can be filed and result in (i) a suspension of the procurement, or (ii) a stay of performance after award has been linked to the debriefing date; (b) the Contracting Officer is permitted to stay performance of an awarded contract if a protest is likely; (c) agencies are given explicit and expanded authority to take corrective action, including paying attorneys' fees; (d) the General Accounting Office (GAO) is discouraged from "rolling over" supplemental protests in order to expand the time taken to make a decision on all protests brought by a single offeror; (e) the protest time frames are changed from business days to calendar days; (f) the hourly rate for attorneys fees payable for a successful protest is limited but fees for experts and consultants are now recoverable; and (g) the terms of settlements of General Services Board of Contract Appeals (GSBCA) protests must be put on the public record.

Additionally, Section 1065 of FASA amended the Federal Property and Administrative Services Act of 1949 to require agencies to provide actual or prospective offerors with reasonable access to a protest file upon request after a GAO protest has been filed. This section will provide Heads of Contracting Activities (HCA) with information concerning implementing procedures for providing access to protest files by actual or prospective offerors after a protest has been filed with the GAO.

II. General

A. Interaction of Debriefing Date and Date for Protest Filing to Suspend Performance

Prior to FASA, an offeror had to file a protest within ten calendar days after award in order to have the ability to suspend performance of the protested contract (the suspension is automatic at GAO, and ordered after a hearing at the GSBCA). Thus, if the offeror had not received its debriefing within ten calendar days after award, it had to file what was known as a "protective protest" within that time frame in order to preserve its ability to pursue its "real protest" and have the contract award be suspended.

FASA changes this situation by requiring debriefings within certain time frames, and changes the time deadlines for filing a protest that will cause the suspension of contract performance. FAR 15.1002 now requires the agency to provide notice of award within three days after contract award. If an unsuccessful offeror requests a debriefing within three days after it received notice of contract award, FAR 15.1004

that were pending for several months in lieu of the required 90 work days. FASA required the GAO to resolve supplemental protests "to the maximum extent practicable" within the time limits established for the initial protest. The GAO's new rules implement this requirement (41 CFR Section 21.9(c)).

E. Protest Time Frames

Prior to FASA, the time frames for certain events in a protest were measured in calendar days, and the time frames for others were measured in business days. FASA required that all days be counted as calendar days and changed the statutory deadlines for each protest forum to issue its decision. The GSBICA was previously required to issue decisions within 45 business days; it must now issue decisions within 65 calendar days. The GAO was previously required to issue decisions within 90 business days; it must now issue decisions within 125 calendar days. Both GAO and the GSBICA have issued revisions to their procedural rules changing the intermediate time deadlines to calendar day calculations. For the most part, this change does not affect the time for making certain filings or the total time for decision.

F. Limits on Attorneys Fees and Expert/Consultant Fees

Prior to FASA, there was some dispute over whether GAO and GSBICA could award a successful protester its costs for experts and consultants. FASA clarified that such fees could be awarded, but limited the hourly rates for such fees. FASA also limited the hourly rate that could be awarded as attorneys fees to \$150 per hour, with certain exceptions (see FAR 33.104(h) and 33.105(g)).

G. GSBICA Settlements Must be Placed in the Public Record

FASA requires that any settlement of a GSBICA protest between an agency and a protester must be made public. Moreover, amounts paid to the protester in the settlement must eventually be paid out of the agency's appropriations instead of the Judgment Fund (see FAR 33.105(f) and (g)).

III. Contents/Access to the Protest File

FAR 33.104(a)(3) has been amended to define the contents of the protest file and to require that access to the file be provided within a reasonable time after the agency report on the protest is submitted to the GAO.

DOE Guidance: The procedures set forth in paragraph V. below should be utilized in the event of a GAO protest in which an actual or prospective offeror requests that a protest file be established. In order to provide notice to offerors about the availability

except for the documents listed at FAR 33.104(a)(3)(iii)(B) - (D). The Protest File shall be redacted as described below in order to protect proprietary information and other information that DOE should or must withhold.

D. Addition of Document to the Protest File

If additional documents are released to the protester, e.g., due to GAO relevance determinations or late discovery of documents, or if a supplemental Agency Report is prepared to address a supplemental protest, the additional documents should be added to the Protest File subject to the guidance on redaction of material in the Protest File set forth in paragraph E. below. A notation should be made in the table of contents as to when each document was added. There is no affirmative duty to notify actual or prospective offerors that have reviewed the Protest File prior to the additions that the Protest File has been supplemented.

E. Redaction of Documents to be Included in the Protest File

Only information that would be available under the Freedom of Information (FOI) Act need be included in the Protest File. Therefore, FOI standards should be used to determine which part(s) of the documents of the Protest File should be redacted. Portions of the offer or proposal may be confidential or proprietary and may appear in other documents; source selection information (e.g., evaluation portion of the SEB or TEC report, evaluation scoring sheets, and similar deliberative material) is generally exempt from disclosure under the FOI. Certain statutes (e.g., the Trade Secrets Act and Procurement Integrity) prohibit the release of certain information. The GAO may have issued a protective order and may have made determinations whether certain information or documents contain proprietary or source selection information. In some cases, entire documents will need to be redacted. These rules and rulings must be given effect, while attempting to include meaningful information in the Protest File. The contracting officer should consult with the DOE attorney representing DOE in the protest and with an FOI authorizing/denying official in determining which part(s) of documents to redact.

F. Access to the Protest File

The contracting officer is to make the Protest File available to any actual or prospective offeror making a written request, the latter entity having access only where a protest was filed prior to the date and time set for receipt of proposals. The Protest File will remain available until final disposition of the protest, including any request for reconsideration. The contracting officer should maintain a record of each request and the time and date any entity was given access to the Protest File.

ALLOWABLE CONTRACT COSTS

I. Background

On August 16, 1995, the FAR Council issued final rules that amended the FAR provisions governing various cost principles, contractor certification of costs, and penalties for unallowable costs (60 FR 42640). These rulemakings were necessitated by sections 2051, 2151 and 2191 of FASA, which provides, among other things, specific costs which are not allowable, clarification of cost principles applicable to certain contractor costs, reimbursement of contractor travel expenses, fraud remedies, contractor certification of costs, and penalties for unallowable costs.

Accordingly, this chapter is intended to provide information regarding recent changes in the law and the FAR regarding various cost principle provisions, contractor certification of costs, and penalties for unallowable costs, and to alert contracting activities to future revisions of the Department of Energy Acquisition Regulation (DEAR) regarding these matters. This guidance is for use in the negotiation of advance understandings related to these costs.

II. Various Cost Principles

A. General

Section 2151 of FASA extends to civilian agencies certain cost allowability requirements which had previously been applicable only to the Department of Defense. As a practical matter, the FAR already addressed these requirements, and, except for the changes identified below, the pertinent FAR provisions remain unchanged. However, it should be noted that, with the enactment of FASA, these provisions have a statutory rather than a regulatory basis. Specifically, the FAR regulations implementing section 2151 of FASA made the following changes to the cost principle provisions at FAR 31.2: the costs of lobbying the legislative body of a political subdivision of a state are unallowable; the cost of "conventions" is to be clarified in the cost principles; and specific limitations are placed on the allowability of severance payments to foreign nationals employed outside the United States.

B. Severance Payments to Foreign Nationals

FAR 31.205-6(g) is amended to add a new paragraph (3) which stipulates that severance payments to foreign nationals employed under a service contract or subcontract performed outside the U.S. are unallowable to the extent that they exceed amounts typically paid to employees providing similar services in the U.S.

These certification requirements are also made specifically applicable to DOE management and operating contracts as FASA provides that any submission by a contractor of costs which are incurred by the contractor and which are claimed to be allowable under DOE Management and Operating contracts shall be considered a "proposal for the settlement of indirect costs incurred by the contractor for any period after such costs have been accrued."

B. Summary of Certification Requirements

Proposals shall not be accepted and no agreements shall be made to establish billing rates or final indirect cost rates unless the costs have been certified by the contractor pursuant to the new FAR Clause at 52.242-4 "Certification of indirect costs".

Implementing regulations at FAR 42.703-2 also provide for:

- (i) A waiver of the certification requirements by the agency head, or designee, when it is determined to be in the best interests of the United States, and the reasons for the determination are put in writing and made available to the public;
- (ii) Contracting Officer authorization to unilaterally establish billing or indirect cost rates when a contractor fails to certify its proposal for billing or indirect cost rates and a waiver is not appropriate; and
- (iii) Penalties to be assessed for unallowable cost submissions by contractors in final indirect cost rate proposals.

DOE Guidance: The waiver of the certification requirement cited in paragraph B.(i) above is delegated to the Contracting Officer.

The Department intends to amend the DEAR to ensure consistency with the statutory limitation and the implementing FAR regulations described above. In the interim, in new management and operating (M&O) contracts and extensions of existing M&O contracts, Contracting Officers shall ensure that the terms of these agreements are consistent with the principles in this chapter, and the FAR regulations cited above, and request any individual deviations from the DEAR required to effect these new requirements. The following DEAR Sections are affected:

ENTERTAINMENT, GIFT AND RECREATION COSTS

I. Background

On August 16, 1995, the FAR Council issued a final rule that amended the FAR cost principles governing entertainment, gift, and recreation costs (60 FR 42648). This rulemaking was necessitated by section 2192 of FASA which provides, among other things, that the "costs of gifts or recreation for employees of a contractor or members of their families that are provided by the contractor to improve employee morale or performance or for any other purpose are unallowable" unless, within 120 days of enactment, the FAR Council issues regulations specifying the circumstances under which such costs are allowable.

Accordingly, this chapter is intended to provide information regarding recent changes in the law and FAR regarding the allowability of employee morale, gift, entertainment, and recreation costs, and to alert contracting activities to future revisions of the DEAR regarding these matters. The guidance contained in this chapter is for use in the negotiation of advance understandings related to these costs.

II. Summary of Significant Changes

The final rule amended FAR 31.205-13, Employee morale, health, welfare, food service, and dormitory costs and credits, and FAR 31.205-14, Entertainment costs. It provides that:

- (i) the cost of gifts are unallowable;
- (ii) Awards for performance and awards made in recognition of achievements pursuant to an established contractor plan or policy are allowable;
- (iii) the costs of recreation are unallowable, except for the costs of contractor employee participation in company sponsored sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness (including wellness/fitness centers); and
- (iv) with respect to entertainment costs, costs which are unallowable under this cost principle would not be allowable under any other cost principle.

DOE Guidance: The Department intends to amend Part 970 of the DEAR to ensure consistency with the statutory limitation and the implementing FAR regulation described above. Specifically, the following DEAR citations are affected:

WHISTLEBLOWER PROTECTION

I. Background

This chapter provides guidance pertaining to Section 6006 of FASA, and implementing regulations at Subpart 3.9 of the FAR. Specifically, this chapter provides a summary comparison and guidance on the FASA and FAR provisions regarding whistleblower protection for contractor employees, and the DOE contractor employee protection program found at 10 CFR Part 708.

II. Summary Comparison of FAR Subpart 3.9 and 10 CFR Part 708

A. Applicability

FAR Subpart 3.9 is applicable to all Government prime contracts.

10 CFR Part 708 is applicable to DOE contracts and subcontracts where work is performed on-site at a DOE-owned or leased facility.

B. Scope

FAR Subpart 3.9 provides protection for contractor employees who disclose information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract).

10 CFR Part 708 provides protection for contractor employees who:

- (i) provide information to DOE, to Congress, or to their contractors (including any higher tier contractor) concerning violations of law, rules or regulations; substantial or specific dangers to public or employee health and safety; or matters involving fraud, mismanagement, gross waste of funds, or abuse of authority;
- (ii) Participated in a Congressional proceeding or in a proceeding conducted pursuant to 10 CFR Part 708; or
- (iii) Refused to participate in an activity, policy, or practice when such participation meets the criteria at 10 CFR Part 708.5(a)(3)(i).

- If informal resolution is reached, the Head of the Field Element or designee shall enter into a written settlement agreement which terminates the complaint.
- If informal resolution cannot be reached, the Head of the Field Element shall provide the complaint file to the Office of the Assistant Inspector General for Contractor Employee Protection, IG-44 (formerly the Director, Office of Contractor Employee Protection, FM-40) who shall order an investigation within 15 days of receipt of the file from the Head of the Field Element.
- Unless the complaint is dismissed at some point during the investigation, a party to the complaint is afforded 15 days from the date of receipt of the report of investigation to request a hearing on the complaint, at which time the complaint file is forwarded to the Office of Hearings and Appeals. A hearing will normally be held within 60 days of the Office of Hearings and Appeals receipt of the complaint file.
- If a hearing is not requested, within 45 days of the date the parties receive the investigation report, IG-44 shall issue an initial agency decision. If a hearing is held, the Hearing Officer shall issue an initial decision within the time frames specified in 10 CFR 708.10(b).

E. Remedies

FAR Subpart 3.9 provides that if the head of the agency or designee determines that the contractor has subjected one of its employees to a reprisal for disclosing a substantial violation of law, one or more of the following actions may be taken:

- (i) Order the contractor to take affirmative action to abate the reprisal;
- (ii) Reinstatement of complainant to original position with compensation, employment benefits and other terms and conditions that would apply if the reprisal had not been taken;
- (iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses reasonably incurred by or in connection with bringing the complaint (e.g., attorneys fees).

The head of the agency shall request the Department of Justice to file an action for enforcement in the United States district court for contractors failing to comply with an order.

10 CFR Part 708 provides that, if an initial agency decision contains a

Federal Acquisition Streamlining Act Implementing Regulations

Federal Acq'n. Circ.	Federal Register Issue Date Starting Page	Content	Effective Date
90-24	December 15, 1994 59 FR 64786	Interim rule. Micro-Purchase Procedures	December 15, 1994
90-28	June 26, 1995 60 FR 33064	Final Rule. Debarment, Suspension and Ineligibility (Reciprocal Gov'twide effort.)	August 25, 1995
90-29	July 03, 1995 60 FR 34732	Interim rule. Electronic Contracting Simplified Acquisition Procedures FACNET	July 3, 1995
90-30	July 21, 1995 60 FR 37771	Final Rule Officials Not to Benefit Procurement Integrity Whistleblower Protection Repeal of Requirements for Secretarial/Agency Head Determinations Regarding Use of Cost Type or Incentive Contracts	September 19, 1995
		Service Contract Funding	August 21, 1995
90-31	August 16, 1995 60 FR 42648	Final Rule Consolidation and Revision of the Authority to Examine Records. Contract Award Implementation. Penalties on Unallow. Indirect Costs. Implementation of Various Cost Principle Provisions. Entertainment Gift and Recreation Costs for Contractor Employees. Contractor Overhead Certifications.	For solicitations issued on or after October 10, 1995
90-32	September 18, 1995 60 FR 48206	Final Rule. I. Truth in Negotiations Act and Related Changes. II. Protests, Disputes and Appeals. III. Acquisition of Commercial Items. IV. Whistleblower Protection for Contractor Employees. V. Small Business. IV. Publicizing Contract Actions. VII. Subcontractor Payments. VIII. Reimbursement of Protest Costs.	Items I and V to VIII are applicable for solicitations issued on or after October 1, 1995. Item II is applicable to protests and claims filed on or after October 1, 1995. Item III is applicable to solicitations issued on or after October 1, 1995, however, use of the new policies, provisions and clauses is optional for solicitations issued before December 1, 1995, and mandatory for solicitations issued on or after December 1, 1995. Item IV is effective September 19, 1995.
90-33	September 26, 1995 60 FR 49707	Final Rule. Contract Financing Special Contracting Methods Task and Delivery Order (includes an interim amendment to FAR 16.500; comments due November 27, 1995.) Fraud Remedies Assignment of Claims	For solicitations issued on or after October 1, 1995.

CLAUSES FOR SUBCONTRACTS FOR COMMERCIAL ITEMS

Management and operating contracts contain the clause at 970.5204-44 which, in paragraph (b) requires that the listed clauses are to be included, when appropriate, in subcontracts awarded by the M&O contractors. As a result of the implementation of the Federal Acquisition Streamlining Act, the clause at FAR 52.244-6 is also to be included in all M&O prime contracts. The effect of that clause will be to limit the clauses that are to be included in subcontracts for "commercial items" as that term is defined in the FAR clause at 52.202-1, entitled "Definitions."

Based upon the language of the clause at FAR 52.244-6, it would appear that no FAR clauses, other than those listed in subparagraphs (c)(1) through (c)(4) of the clause at 52.244-6 and, under certain circumstances, pricing related clauses, would apply to subcontracts for commercial items. That is not the case. While FASA made certain provisions of certain laws inapplicable to the acquisition of commercial items by contractors (see FAR 12.504), provisions of other Federal statutes that are not listed in paragraph (c) of FAR clause 52.244-6 continue in effect and will apply to appropriate subcontracts awarded by M&O's. In addition, there are certain laws and Executive Orders that apply to the Department of Energy that are not excluded by the provisions of FASA or paragraph (c) of FAR clause 52.244-6, and which will continue to require the incorporation of certain DOE clauses into applicable M&O subcontracts for commercial items.

Accordingly, the Office of Policy has performed an analysis of each of the provisions listed in paragraph (b) of DEAR clause at 970.5204-44 to aid offices in the determination of the clauses that M&O contractors should flowdown to subcontracts for commercial items. The following guidance is provided on the applicability and/or inapplicability of each clause currently set forth at DEAR 970.5204-44 for M&O subcontracts for commercial items:

Clauses Required For All M&O Subcontracts For Commercial Items

The following clauses contained at DEAR 970.5204-44 are required to be included in all M&O subcontracts for commercial items:

- **970.5204-44(b)(9), Employment of the Handicapped** is required for subcontracts for commercial items by the terms of the clause at FAR 52.244-6.
- **970.5204-44(b)(11), Equal Employment Opportunity**, is required for subcontracts for commercial items by the terms of the clause at FAR 52.244-6.
- **970.5204-44(b)(23), Special Disabled and Vietnam Era Veterans**, is required for subcontracts for commercial items by the terms of the clause at FAR 52.244-6.

NOTE: In addition to the three clauses above, FAR clause 52.244-6 also requires the incorporation of FAR clause 52.247-64, Preference for Privately Owned U.S.-Flagged Commercial Vessels. However, flowdown of this clause is not required for subcontracts awarded beginning May 1, 1996.

- **970.5204-44(b)(8), Davis-Bacon Act.** If a DOE M&O contractor awards a subcontract for the purchase of a commercial item that would otherwise be subject to Davis-Bacon requirements, e.g., the purchase of roofing services, the Davis-Bacon clauses must be flowed down to comply with the statute and the prime contract.
- **970.5204-44(b)(10), Environmental and Occupational Safety and Health.** In order for DOE to fulfill its statutory obligations prior to the inclusion of the clause at FAR 52.244-6 into their prime contracts, M&O contractors were required to include applicable clauses referenced in 970.2303-2 in appropriate subcontracts. The Department finds no reason to distinguish between commercial and noncommercial purchases from subcontractors for purposes of this flowdown requirement. Therefore, M&O contractors should incorporate, where applicable, the clauses referenced in 970.2303-2 in subcontracts for commercial items.
- **970.5204-44(b)(12), Examination of Records by Comptroller General,** would be required to be incorporated into commercial item subcontracts when a subcontractor is required to provide cost or pricing data. It should be noted that the clause at FAR 52.215-1 has been deleted and its contents have been incorporated into the clause at FAR 52.215-2, "Audit, Records, and Negotiation." See FAC 90-31.
- **970.5204-44(b)(14), Nuclear Hazards Indemnity.** The DOE statutory coverage underlying this requirement is, in no way, determined by factors relating to whether particular subcontracts are for commercial items. The clause at DEAR 952.250-70 is required for prime contracts and subcontracts meeting the statutory tests and requires M&O contractors, and any other prime contractor subject to the clause, to flowdown the clause referenced in DEAR 970.2870 to appropriate subcontractors.
- **970.5204-44(b)(15), Organizational Conflicts of Interest.** The DOE statutory requirements that require the flowdown of the clause at DEAR 952.209-72 are based upon whether a subcontract would be for "technical consulting and management services" or "evaluation services or activities." To the extent that subcontracts for "commercial services" could be awarded involving those types of services, the requirement would remain. M&O contractors, and other covered contractors, are required to flowdown DEAR 952.209-72 to appropriate commercial subcontractors in order for DOE to meet its statutory OCI obligations.
- **970.5204-44(b)(16), Patent, Data and Copyrights.** M&O contractors and other contractors whose contracts are for research, development, or demonstration are subject to DOE's statutory patent policy as reflected in the DOE specific clauses, and are required by the flowdown provisions of their contracts to include the patent clause designated in the prime contract in subcontracts for research, development, or demonstration. Should any subcontract for commercial items, particularly involving the furnishing of "commercial services," fall within the flowdown requirements of the prime contract, the subcontract must include the appropriate DOE patent clause and the clauses at FAR 52.227-1, Authorization and Consent, and 52.227-3, Patent Indemnity, as appropriate. Those latter

subcontracting opportunities and to require all subcontractors (except small business concerns) who receive subcontracts in excess of \$500,000, or \$1,000,000 in the case of construction, to adopt a plan similar to the plan agreed to by the offeror. Therefore, the Utilization clause must be included in appropriate subcontracts for commercial items. For the purposes of subcontracts for commercial items, a commercial item subcontracting plan meets the "similar" test and is the preferred form of a plan even where the prime is not for commercial items and has not adopted a commercial item subcontracting plan. See OFPP Policy Letter 95-1, dated September 20, 1995.

Clauses That Are Not Required For M&O Subcontracts For Commercial Items

The following clauses set forth at DEAR 970.5204-44 are not required to be included in M&O subcontracts for commercial items:

- **970.5204-44(b)(1), Air Transportation by U.S.-Flag Carriers**, is not required to be incorporated into subcontracts for commercial items.
- **970.5204-44(b)(2), Anti-Kickback Act**. The clause at FAR 52.203-7 is not required to be flowed down to subcontracts for commercial items; however, the prohibitions, and criminal and civil penalties provisions continue to apply..
- **970.5204-44(b)(3), Clean Air and Water**. Subcontracts for commercial items are exempt from the certification requirements and the clause flowdown requirements of FAR 52.223-1.
- **970.5204-44(b)(4), Contract Work Hours and Safety Standards Act**. The clause at FAR 52.222-4 and the associated certification requirements are not required to be flowed down to subcontracts for commercial items.
- **970.5204-44(b)(6), Cost and Schedule Control Systems**. In light of FAR 52.244-6, the requirements of the clause at DEAR 970.5204-50 need not be flowed down to subcontracts for commercial items; however, M&O contractors should incorporate any appropriate requirements of 970.5204-50 in appropriate subcontracts for commercial items when those requirements are necessary to ensure compliance with obligations under the prime contract.
- **970.5204-44(b)(13), Foreign Travel**. The clause at DEAR 970.5204-52 is not required to be flowed down to subcontracts for commercial items.
- **970.5204-44(b)(21), Service Contract Act**, is not required to be incorporated into subcontracts for commercial items.
- **970.5204-44(b)(24), Taxes**. In light of the clause at FAR 52.244-6, the requirement to flowdown a clause similar to DEAR 970.5204-23, "Taxes," for cost-reimbursement and fixed price subcontracts pursuant to a policy determination by DOE does not apply



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

September 20, 1995

POLICY LETTER 95-1

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Subcontracting Plans for Companies Supplying Commercial Items

1. Purpose. The purpose of this Policy Letter is to establish policies on the requirement for subcontracting plans for companies supplying commercial items.

2. Authority. This Policy Letter is issued pursuant to section 6 of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. 405.

3. Definition. Commercial plan means a subcontracting plan covering the offeror's fiscal year and which is applicable to the entire production of commercial items sold by either the entire company or portion thereof (e.g., corporation, company, division, plant, or product line). As used in this Policy Letter, the term "commercial item" is a product or service that satisfies the definition of commercial item in section 8001 of FASA (41 U.S.C. 403).

4. Background. Section 8 (d) of the Small Business Act (15 U.S.C. 637(d)) requires that each contract that exceeds \$500,000 (\$1 million in the case of construction), and that offers subcontracting opportunities, include a requirement that the apparently successful offeror negotiate a subcontracting plan which shall become a material part of the contract. The requirement for subcontracting plans does not apply to small businesses. The above requirements have been implemented by OFPP Policy Letter 80-2 "Regulatory Guidance on Section 211 of Public Law 95-507" dated April 29, 1980, and Supplement No. 1 dated May 29, 1981, and further implemented in Part 19 of the Federal Acquisition Regulation (FAR). OFPP Policy Letter 80-2 specifically authorized the use of an annual commercial subcontracting plan that relates to the contractor's commercial and noncommercial production when the government is acquiring a commercial item.

Sections 8104 and 8203 of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, establish a preference for the acquisition of commercial items by the Department of Defense and civilian agencies. In establishing this preference, Congress expressed concern that implementing

- (b) subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item.

(3) Furthermore, it is the policy of the United States Government that commercial plans, when authorized under this Policy Letter, shall be the preferred method of compliance with the requirements of section 8(d) of the Small Business Act. In all solicitations expected to offer subcontracting opportunities which trigger the requirements for a subcontracting plan, the Government shall inform prospective offerors of the opportunity for themselves and/or their subcontractors to develop commercial plans if they are supplying commercial items. This would apply whether or not the prime contractor is supplying a commercial item.

(4) This policy is in addition to the existing policies cited in Section 3 of this Policy Letter. This Policy Letter supersedes any provisions inconsistent with prior OFPP Policy Letters.

6. Contracting Officer Responsibilities. Contracting officers shall ensure that:

(1) These provisions for subcontracting plans for commercial item contractors do not in any way relieve contracting officers, prime contractors or subcontractors of their responsibilities for assuring that small, small disadvantaged and women-owned small businesses have the maximum practicable opportunity to participate in contracts awarded by Federal agencies.

(2) The use of a commercial subcontracting plan does not relieve a contractor of the requirement to make a good faith effort to comply with the requirements of the subcontracting plan.

(3) Contracting officers should impose liquidated damages as applicable when contractors fail to comply with subcontracting plans.

(4) When a contractor has a commercial plan previously approved by another agency's contracting activity or another Federal agency for the company's fiscal year, the contracting officer shall obtain a copy of the plan and the approval document from the contractor. These documents shall be incorporated into the contract.

(5) Since a commercial plan may be applicable to contracts awarded by more than one contracting activity or Federal agency, contracting officers must ensure that the

MODEL CONTRACT CLAUSES**"TASK ORDERS"**

(a) The Contractor shall incur costs under this contract only in performance of task orders and revisions to task orders signed by the Contracting Officer and provided to the Contractor. Costs not attributed to the performance of a specific task order will not be allowed without the prior written consent of the Contracting Officer. The Contractor shall commence performance upon the receipt of a task order signed by the Contracting Officer.

(b)(1) When requesting task proposals from the contractors in accordance with the clause entitled "Procedures for Issuing Task Orders," the Contracting Officer will inform the contractors of (i) the task to be performed; (ii) the schedule of performance; (iii) any required travel; (iv) deliverables and required delivery dates; and (v) any Government-furnished property to be provided. The Contractor shall provide its task proposal within 2 working days of receipt of the request, unless otherwise specified by the Contracting Officer.

(2) When issuing a task order to a contractor that did not result from the submission of task proposals, the Contracting Officer will provide the signed task order to the contractor along with the information in subparagraph (b)(1).

(c)(1) The Contractor's task proposal shall consist of the following information: (i) Direct Productive Labor Hours (DPLH), both straight and overtime (if authorized), on a monthly basis by applicable labor category, and the total DPLH, including those in (iii) below, estimated to complete the task; (ii) the travel and material estimate; (iii) an estimate for subcontractors and consultants, including the DPLH, if applicable; (iv) estimate other direct costs, including any computer use time required, if applicable; (v) other pertinent information, indirect costs, consultants, inter-divisional transfers, etc.; (vi) the total estimated cost and fixed fee [* or firm fixed price] for completion of the task order; and any necessary revision to the schedule of performance. The Contractor shall assure that labor rates and indirect rates proposed are in accordance with Appendix ____ of this contract.

(2) Within 10 working days after receiving a task order signed by the Contracting Officer that did not result from the submission of task proposals, the Contractor shall provide the Contracting Officer with a task plan consisting of the information described in subparagraph (c)(i).

END OF CLAUSE

[* COST REIMBURSEMENT TYPES OF CONTRACTS] (d) After the Contracting Officer issues a signed Task Order to the Contractor, if any revision becomes necessary to the estimated cost (more than + or -10% variance), or level of effort (more than + or -10% variance), the Contractor shall promptly submit to the Contracting Officer a revised Task Plan with explanatory notes. Revised Task Plans submitted by the Contractor are subject to the review of the Contracting Officer.

[FIXED PRICE VERSION (B)] (i) When the issuance of a task order is to be based entirely on price, the Contracting Officer will provide each contractor information as delineated in Article ___ of this contract relating to the prospective task, specifying that the award will be based entirely or substantially on price. The Contractor will provide a proposal on a firm fixed price basis, composed of direct labor costs, labor categories and the direct productive labor hours for each category, indirect costs, other direct costs, and profit. The labor rates and indirect rates will be in accordance with Appendix _ of this contract. The Government will perform an analysis of the price proposal to assure that the rates conform to the Appendix.

(ii) The Contracting Officer may choose to base award substantially on price. In that case the Contracting Officer will issue a request for task proposals which specifies any additional selection factors, and their relative importance, to be used in selecting the recipient of the task.

[* Versions (A) and (B), should not appear in the same contract.]

2. Issuance of Task Orders Based Entirely or Substantially on Performance of Previous Task Orders.

(i) In issuing tasks based entirely on performance of previous tasks, the Contracting Officer, along with the Technical Representative named elsewhere in this contract, will evaluate records of the contractors' technical performance and cost control [* UNDER COST REIMBURSEMENT TYPES OF CONTRACTS] on previous tasks issued under all contracts for the work specified in the Statement of Work of this contract, taking into account performance under tasks most comparable to the prospective task. In order to issue tasks on this basis where all contractors have not performed tasks under this and the companion contracts, the Contracting Officer may consider the quality of the contractors' technical proposals under the solicitation leading to the award of this contract, taking into account the portion of the proposal most comparable to the prospective task. After such an evaluation, the Contracting Officer will make award to the contractor he or she believes most likely to perform the task at the highest quality at the best value. If issuance of a task will be based entirely on performance of previous tasks, task proposals will not be requested.

(ii) The Contracting Officer may choose to base issuance of a task substantially on performance of previous tasks. In that case, the Contracting Officer will issue a request for task proposals which specifies any additional selection factors, and their relative importance, to be used in selecting the recipient of the task.

3. Issuance of Task Orders Based upon Other Criteria.

In issuing tasks under this procedure, the Contracting Officer may base the issuance on any other factors which he or she deems appropriate in the exercise of sound business judgment. Such factors include, but are not limited to, selection based upon highest technical rating of proposals for performance of a prospective task, or determination by the Contracting Officer that there is need for greater balance in workload among this and the

I. Revise DEAR 933.106 to add the following sentence:

The contracting officer shall include the provision at 952.233-4 in solicitations above the simplified acquisition threshold.

II. ADD DEAR 952.233-4

Contracting officers shall include the following clause in solicitations in accordance with 933.106.

NOTICE OF PROTEST FILE AVAILABILITY

(a) If a protest of this procurement is filed with the General Accounting Office (GAO) in accordance with 4 C.F.R. Part 21, any actual or prospective offeror may request the Department of Energy to provide it with reasonable access to the protest file pursuant to FAR 33.104(a)(3)(ii), implementing section 1065 of Pub.L. 103-355. Such request must be in writing and addressed to the Contracting Officer for this procurement.

(b) Any offeror who submits information or documents to the Department for the purpose of competing in this procurement is hereby notified that information or documents it submits may be included in the protest file that will be available to actual or prospective offerors in accordance with the requirements of FAR 33.104(a)(3)(ii). The Department will be required to make such documents available unless they are exempt from disclosure pursuant to the Freedom of Information Act. Therefore, offerors should mark any documents as to which they would assert that an exemption applies. See 10 CFR 1004.

END OF PROVISION

970.25--FOREIGN ACQUISITIONS**970.2501 Severance payments for foreign nationals.**

(a) The Head of the Contracting Activity may waive the application of the provisions of 970.3102-2(i)(2)(iv) and (v) in accordance with 41 U.S.C. 256(e)(2) if:

- (1) The application of the provisions would adversely affect the continuation of a program, project, or activity that provides significant support services for Department of Energy employees posted outside the United States;
- (2) The contractor has taken, or plans to take, appropriate actions within its control to minimize the amount and number of incidents of payment of severance pay to employees under the contract who are foreign nationals; and
- (3) The payment of severance pay is necessary to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services or is necessary to comply with a collective bargaining agreement.

(b) Solicitation Provision and Contract Clause

The solicitation provision at 970.5204-73, Waiver of Limitations on Severance Payments to Foreign Nationals, shall be included in solicitations and resulting contracts involving support services for Department of Energy operations outside of the United States expected to exceed \$500,000, when, prior to the solicitation, the limitations on severance to foreign nationals has been waived. Use the Alternate 1 contract clause in solicitations and resulting contracts, when the Head of the Contracting Activity may waive the limitations on severance to foreign nationals after contract award.

970.3101-3 General basis for reimbursement of costs.

* * * * *

(b) A contracting officer shall not resolve any questioned costs until the contracting officer has obtained:

- (1) Adequate documentation with respect to such costs; and
 - (2) The opinion of the Department of Energy Inspector General on the allowability of such costs.
- (c) The contracting officer shall ensure that the documentation supporting the final settlement addresses the amount of the questioned costs and the subsequent disposition of such questioned costs.

(d) The contracting officer shall ensure, to the maximum extent practicable, that the Department of Energy Inspector General is afforded an opportunity to attend any negotiation or meeting with the contractor regarding a determination of allowability.

970.3101-7 Cost submission, certification, penalties, and waivers.

(a) The contracting officer shall require that management and operating contractors provide a submission for settlement of costs incurred during the period stipulated on the submission and a certification that the costs included in the submission are allowable. The contracting officer shall assess a penalty if unallowable costs are included in the submission. Unallowable costs are either expressly unallowable or determined unallowable. They are defined as follows:

- (1) An expressly unallowable cost is a particular item or type of cost which, under the express provisions of an applicable law, regulation, or this contract, is specifically named

similar services in the same industry in the United States.

(v) Further, under 41 U.S.C. 256(e)(1)(N), the costs of severance payments referred to in paragraph (iv) of this subparagraph are unallowable if the termination of employment is the result of the closing of, or curtailment of activities at a United States facility in that country at the request of the government of that country.

(vi) The Head of the Contracting Activity may waive the application of the provisions of (iv) and (v) of this subparagraph under the conditions specified in 970.25.

* * *

(p) Special compensation. The following costs are unallowable:

(1) Special compensation to employees pursuant to agreements which permit payments in excess of the contractor's normal severance pay practices, if their employment terminates following a change in the management control over, or ownership of, the contractor or a substantial portion of its assets.

(2) Special compensation to employees pursuant to agreements which permit payments resulting from a change, whether actual or prospective, in the management control over, or ownership of, the contractor or a portion of its assets which is contingent upon the employee remaining with the contractor for a stated period of time.

970.3102-7 Political activity costs.

Contractor costs incurred to influence either directly or indirectly --

(a) Legislative action on any matter pending before Congress, a State legislature, or a local legislature; or

(b) Federal, State, or local executive branch action on regulatory and contract matters, other than costs incurred in regard to contract proposals are unallowable contract costs unless approved by the contracting officer.

970.3102-17 Travel costs.

* * * * *

(b) Government-owned, commercial rental, and company-furnished vehicles.

* * *

(3) The costs of contractor-owned or -leased vehicles include the costs of lease, operation, maintenance, depreciation, insurance, and other similar costs. These costs are unallowable except as approved by the contracting officer. Except, no cost shall be allowed for the cost of company-furnished vehicles that are authorized for personal use by the employees.

970.3103 Contract clauses.

* * *

(b) The political activity cost prohibition clause at 970.5204-17 shall be included in all M&O contracts.

* * * * *

970.5204-13 Allowable costs and fixed-fee (Management and Operating contracts).

* * * * *

(e)(31) Contractor costs incurred to influence either directly or indirectly --

970.5204-13 Allowable costs and fixed-fee (Management and Operating contracts).

* * * * *

(d)(8)(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards; employee counseling services, health or first-aid clinics; house or employee publications; and wellness/fitness centers;

* * *

(e) Items of unallowable costs. The following items of costs are unallowable under this contract to the extent indicated:

* * *

(11) Entertainment, including costs of amusement, diversion, social activities; and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities; costs of membership in any social, dining or country club or organization. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle.

* * * * *

(37) Costs of gifts; however, gifts do not include awards or performance or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.

(38) The costs of recreation, except for the costs of employees' participation in company sponsored sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.

970.5204-14 Allowable costs and fixed-fee (support contracts)

* * * * *

(d)(8)(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards; employee counseling services, health or first-aid clinics; house or employee publications; and wellness/fitness centers;

* * *

(e) Items of unallowable costs. The following items of costs are unallowable under this contract to the extent indicated:

* * *

(9) Entertainment, including costs of amusement, diversion, social activities; and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities; costs of membership in any social, dining or country club or organization. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle.

* * * * *

(35) Costs of gifts; however, gifts do not include awards or performance or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.

(36) The costs of recreation, except for the costs of employees' participation in company sponsored sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.